Supreme Court, U.S.
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No. 85-1499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LANDAHL, BROWN & WEED ASSOCIATES, INC.,

Petitioner,

v.

CITY OF CAPE CORAL,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Florida

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	2
CONCLUSION	5
APPENDIX	1a
Order of Trial Court 2/21/86	1a
Order of Trial Court 3/20/86	2a
Notice of Appeal 3/17/86	3a
Petitioner's Brief in Florida Supreme Court	4a

TABLE OF AUTHORITIES

CASES: Page

Agins v. Tiburon, 447 U.S. 255 (1980) 5

Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978) 4

Penn Central Transit Co. v. New York City, 438 U.S. 104 (1978) 3

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. ___(1985) 4

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OPINIONS BELOW

The opinion of the Supreme Court of Florida, declining to accept jurisdiction, is not officially reported, and is reproduced at Petitioner's App. A.

The opinion of the Second District Court of Appeal of Florida is reported at 470 So.2d 25 (2nd DCA 1985). The opinion is reproduced at Petitioner's App. C.

Order of Trial Court upon remand is reproduced at Respondents Appendix page 1a.

Order of Trial Court on motion to set aside judgment is reproduced at Respondents Appendix page 2a.

STATEMENT OF THE CASE

Respondent adopts petitioner's Statement of the Case as being substantially correct. Upon remand to the trial court, an order was entered for the respondent, Respondent's Appendix page 1a, and an order denying petitioner's Motion To Set Aside Judgment, Respondent's Appendix page 2a.

Petitioner has filed a "Notice of Appeal", Respondent's Appendix page 3a.

ARGUMENT

I. Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl to continue to engage in construction under validly issued building permits in which Landahl had expended $266,000, effected a taking for which the Fifth Amendment requires the payment of money damages to compensate for such taking.

II. Whether the City of Cape Coral in the application of its zoning or building code, in refusing to permit Landahl to engage in construction under validly issued building permits in which Landahl had expended $266,000, engaged in an invalid exercise of the police power in violation of the due process clause of the Fourteenth Amendment and/or 42 U.S.C. § 1983.

Petitioner in its "Questions Presented For Review" raises issues alleged in the complaint but neither tried

by the Trial Court (appendix page 13a) (Petitioners Brief page 9) nor raised on review with the Appellate Courts (Appendix page 6a and 7a). Possibly petitioner intends to raise such issues in the state courts in its latest appeal of the February 21, 1986 trial court order. (Appendix page 3a)

Petitioner claims that the wrongful revocation of a building permit by officials of a municipality amounts to a taking for which petitioner is entitled to just compensation. The Florida Appellate Court ruled that municipalities are immune from an action for damages as a result of the manner in which they exercise this governmental function. A party has only the right to retain the permit not the right to sue for damages.

Petitioner chose to sue for damages rather than to retain the permit or appeal the official decision. (Petitioners Appendix C page 2) Apparently petitioner sought damages because equitable relief, even if granted within 90 days of the stopping of construction, would not have benefited petitioner, especially in view of the 1975 economy. (Petitioner's Brief page 9) This resort to the courts with its claim for damages (Petitioner's Brief page 8) avoided the municipality's final determination in this matter, and without final action by the municipality, there can be no taking of property.

The official's wrongfully made decision to revoke a building permit may be set aside as a matter of law. Such action cannot, at the option of the permit holder, become a taking.

A taking may be by acquisition, as when one takes possession of another's property, or by regulation when government actions force some people alone to bear public burdens which, in all fairness and justice,

should be borne by the public as a whole. *Penn Central Transit Co. v. New York City,* 438 U.S. 104 (1978)

There can be no public benefit realized by the wrongful revocation of a building permit and therefore no justification for compensation from the municipality to the injured party. While a judgment for damages against the individual tortfeasor may be appropriate, equitable relief against a municipality can fully restore an injured party and benefit the public by requiring public officials to comply with the law.

It was not the official actior of the municipality to amend its building code tha was the basis for the civil rights claim of the petitioner, but the wrongful conduct of the city official in revoking the building permit. This wrongful conduct of the individually named defendants (Appendix page 14a) cannot, absent direct involvement, support a claim against the municipality. It is only where the action that is alleged to be unconstitutional, implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by a municipality that there would lie a cause of action against a municipality. *Monell v. New York City Dept. of Soc. Serv.* 436 U.S. 658, 690 (1978)

Petitioner's reliance upon *Williamson Planning Comm'n v. Hamilton Bank* 473 U.S. ___(1985) as providing for money damages is not justified. Hamilton Bank was injured by regulation of its property, petitioner by wrongful act of officials. Hamilton Bank's trial was on the denial of civil rights, petitioner's wrongful revocation of permit and Hamilton Bank's judgment is also against the individual officials involved where petitioner's action is only

against the municipality. This substantial difference between application of a zoning law and wrongful conduct of an official is even stronger in *Agins v. Tiburon* 447 U.S. 255 (1980) where it was found that the regulation did not constitute a taking. Injury to a plaintiff is not the same as taking by the defendant.

CONCLUSION

It is submitted that the writ of certiorari should not issue because the matter is subject to review by the Second District Court of Appeal, Federal issues were not litigated in the Florida courts, the wrongful revocation of a building permit does not constitute a taking of property and, in Florida, municipalities are immune from an action for damages under the circumstances of this case.

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APPENDIX

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CIVIL ACTION

CASE NO. 75-1907CA

GILVESY CONSTRUCTION, INC., a Florida corporation
Plaintiff,

vs.

LANDAHL, BROWN & WEED ASSOCIATES, INC., a Virginia corporation, *et al.*,
Defendants.

ORDER

THIS court having previously entered a judgment for LANDAHL, BROWN & WEED ASSOCIATES, INC. against the CITY OF CAPE CORAL and that judgment having been reversed with directions to enter judgment for the CITY OF CAPE CORAL. *(City of Cape Coral v. Landahl, Brown & Weed* 470 So 2d 25 (2nd DCA 1985) Pet. for Rev. denied Fla. Supreme Court Case 67,371 (Dec. 10, 1985)

IT IS ADJUDGED, that judgment is entered for the CITY OF CAPE CORAL and that Third Party Plaintiffs LANDAHL, BROWN and WEED ASSOCIATES, INC. take nothing by this action against the CITY OF CAPE CORAL and that the CITY OF CAPE CORAL go hence without day.

ORDERED at Fort Myers, Florida, on the 21 day of February, 1986.

/s/ James R. Thompson
JAMES R. THOMPSON, Circuit Judge

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CIVIL ACTION

CASE NO. 75-1907CA

GILVESY CONSTRUCTION, INC.,

Plaintiff,

vs.

LANDAHL, BROWN & WEED ASSOCIATES, INC., *et al.*

Defendants.

vs.

CITY OF CAPE CORAL

Third party defendant

ORDER

THIS matter came on for hearing on the motion of Landahl, Brown & Weed Associates, Inc. to set aside the judgment entered by this Court on February 21, 1986 granting final judgment in the case in favor of the City of Cape Coral, after hearing argument of the parties, the Court being of the opinion that the motion should be denied,

IT IS ADJUDGED that the Motion to Set Aside Judgment filed by Landahl, Brown & Weed Associates, Inc. be, and the same is hereby, denied.

ORDERED at Fort Myers, Florida on the 20 day of March 1986.

/s/James R. Thompson
JAMES R. THOMPSON, Circuit Judge

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

CIVIL ACTION

CASE NO. 75-1907CA

GILVESY CONSTRUCTION, INC.,

Plaintiff,

vs.

LANDAHL, BROWN & WEED ASSOCIATES, INC.,

Defendant, Appellant

vs.

CITY OF CAPE CORAL

Third part Defendant, Appellee

NOTICE OF APPEAL

NOTICE IS GIVEN that Landahl, Brown & Weed Associates, Inc., defendant, appellant, and third party plaintiff, appeals to the Second District Court of Appeal, the Order of this Court rendered February 21, 1986. The nature of the order is a final order entering judgment in favor of the City of Cape Coral.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was mailed this 17th day of March 1986 to Richard V.S. Roosa, Esq., P.O. Box 535, Cape Coral, Florida 33910.

/s/EDWARD DEV. BUNN
EDWARD DEV. BUNN

BRIEF ON JURISDICTION

SUPREME COURT OF FLORIDA

APPEAL NO. 67,371

LANDAHL, BROWN & WEED ASSOCIATES, INC.
Plaintiff, Petitioner

VS.

CITY OF CAPE CORAL
Defendant, Respondent

APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	9a
STATEMENT OF FACTS	9a
SUMMARY OF ARGUMENTS	12a
ISSUES PRESENTED FOR REVIEW	
Whether the Second District Court of Appeal Decision was in express and direct conflict with a decision of another district or of the Supreme Court on the same question of law	
Argument I	14a
Argument II	15a
Argument III	16a
Argument IV	18a
CONCLUSION	20a

TABLE OF CITATIONS

Applegate v. Barnett Bank of Tallahassee, 377 So2d 1150 (Fla 1980) 12a, 14a

Bregar v. Britton, 75 So2d 753 (Fla 1954) 16a

City of Miami v. Albro, 120 So2d 23 (Fla 3rd DCA 1960) 13a, 18a, 20a

Commodore Plaza at Century 21, etc. v. Cohen, 350 So2d 502 (Fla 3rd DCA 1977) 12a, 15a

Holmes v. School Board of Orange County, 301 So2d 145 (Fla 4th DCA 1974) 12a, 15a

JOA Corp. v. Lamerica Realty Co., 435 So2d 972 (Fla 3rd DCA 1983) 14a

Karl v. David Ritter, 164 So2d 23 (Fla 3rd DCA 1965) 12a, 15a

National Automobile Insurance Association v. Brumit, 98 So2d 330 (Fla 1957) 12a, 15a

Nasrallah v. State, 180 So2d 477 (Fla 3rd DCA 1965) 15a

Puleston v. Alderman, 4 So2d 704 (Fla 1941) 17a

Renna v. North Lauderdale, 430 So2d 945 (Fla 4th DCA 1983) 14a

Roberts v. Keystone Trucking Co., 259 So2d 171 (Fla 4th DCA 1972) 17a

Rupp v. Bryant, 417 So2d 658 (Fla 1982) 13a, 18a, 19a

Shipp v. City of Miami, 172 So2d 618, 172 So2d 618, 172 So2d 439 (Fla 1965) 13a, 18a

Tamiami Trail Tours, Inc. v. Cotton, 432 So2d 148 (Fla 1st DCA 1983) 12a, 15a

Texas Co. v. Town of Miami Springs, 44 So2d 808 (Fla 1950) 13a, 16a

Town of Largo v. Imperial Homes Co., 309 So2d 571 (Fla 2d DCA 1975) 11a, 13a, 14a, 16a, 17a

Trianon Park Condominium Association, Inc. v. City of Hialeah, No. 63,115 (Fla Apr 4, 1985) 11a, 13a, 14a, 18a, 19a, 20a

Rules

Fla R Civ P 1.190(b) 13a, 15a, 16a
Fla R App P 9.030(a)(2)(iv) 20a

STATEMENT OF THE CASE

This case began in the Twentieth Judicial Circuit, Lee County, Florida by an action being filed against Landahl, Brown & Weed Associates, Inc. (Landahl), *et al.*, for recovery of damages for unpaid construction work performed by the plaintiff on seven construction sites in the City of Cape Coral. Apx 1. Various cross and counter actions were filed, as well as a separate action filed by Landahl against the construction manager of the seven projects, which was consolidated with this action. Landahl also filed a third party action against the City of Cape Coral, and this is the subject of this appeal. Apx 3. Following a jury trial, a judgment was entered in favor of Landahl against the City in the amount of $266,254, Apx 35. The City did not file a motion for a new trial, but did file a motion for remittitur which was denied. Apx 35-36. Thereafter, the City filed a notice of appeal to the Second District court of Appeal. Landahl filed a cross appeal contending the trial court was in error in limiting Landahl's recovery to its out of pocket expenses. On May 8, 1985, the Second District reversed the trial court judgment, and on June 7, 1985, it denied the motion for rehearing filed by Landahl. Apx 61, 92. Landahl filed a notice to invoke the discretionary jurisdiction of this Court on July 8, 1985. Apx 93.

STATEMENT OF FACTS

The decision of the Second District Court of Appeal reads in pertinent part as follows:

> " . . The record we have is pitifully meager and the issues raised on this appeal do not really address the most glaring defects in appellee's attempts to state a viable cause of action against appellant . . . the principles of law that require this result are barely touched on in the brief or in the record below.

* * *

> . . . appellant filed a motion for judgment on the pleadings. It was at this point, if not before, that the trial judge should have entered judgment for appellant.
>
> It also appears that a motion to dismiss with prejudice should also earlier have been granted. However, we are not sure, because of the meager record, that the proper grounds were presented to the trial judge to support the motions. Apx 61.

The motion to dismiss and the motion for judgment on the pleadings of the City were based on the identical same grounds. Apx 17-22. The grounds of the motions, which were argued in writing (cf. Apx 16), were that since Landahl and the initial plaintiff had settled between themselves the trial court lost jurisdiction over the action. The City also contended at this point, which was just prior to trial in a 9 year old action, that the recovery of Landahl, if any, should be limited to the amount of the claim of the initial plaintiff. From its first pleading, 9 years earlier, Landahl had demanded $10,000,000 in damages.

On appeal, the City raised three issues: (1) whether it was improperly joined in the action, (2) whether the Court lost jurisdiction after Landahl settled with the initial plaintiff, and (3) whether the Landahl judgment should have been limited to the amount of the claim of the initial plaintiff. Apx 39.

The Second District did not deal with any of the issues raised by the City either on appeal or in the trial court, and made its ruling upon a barren record for the issues decided. Its ruling was:

> ". . . there is no cause of action for the manner in which a municipality exercises it governmental function of issuing or refusing to issue permits.

> *Trianon Park Condominium Association, Inc.* v. *City of Hialeah,* No. 63,115 (Fla. Apr 4 1985) (10 FLW 210) . . . That is not to say, however, that a party does not have a right to relief from the wrongful refusal or revocation of a building permit. That cause of action is limited though to an action to acquire or retain the permit on the grounds of equitable estoppel. *Town of Largo* v. *Imperial Homes Corp.,* 309 So2d 571 (Fla 2d DCA 1975).

Landahl filed a motion for rehearing pointing out that the record on these issues was incomplete and misleading, and that the first count of Landahl's pleading contained the title, "Equitable Estoppel", requesting relief under the *Town of Largo* case and requesting that the City be enjoined and ordered to reissue the permits. Apx 3-10, 68-69. Landahl's motion for rehearing was denied. Apx 92.

There was no dispute between the parties on the factual issues, and hence, they were not addressed in the Second District. Succinctly stated, Landahl obtained building permits from the City to construct seven high rise residential buildings, expended in excess of $250,000 in out of pocket expenses and had undertaken construction on each of the seven buildings pursuant to the permits when a police officer of the City, allegedly acting as City Manager while the City Manager was out of town for the day, visited each of the building sites and posted notices that construction was to stop. No definite written reason was given for stopping construction, but it was apparent to all concerned that the action was taken in response to substantial public sentiment against the high rise construction. Section 103.2 of the City Code provides that if construction is stopped for any reason the City must state the reason for stopping construction and designate the terms upon which construction may commence again. The City failed to comply with this Code provision and breached other Code provisions and terms of the permits in stopping the

construction. The decision to stop construction did not come from the City's zoning or permit department. See Apx 65-76, 82-91.

SUMMARY OF ARGUMENTS

The decision of the Second District Court of Appeal expressly states that the record is incomplete and the basis of its decision was not raised or argued on appeal. This is in direct conflict with *Applegate* v. *Barnett Bank of Tallahassee,* 377 So2d 1150 (Fla 1980) that the decision and proceedings of the trial court are presumed correct and the burden is on the appellant (City) to demonstrate error. The decision of the Second District held that Landahl's pleadings did not state a cause of action against the City on the theory of equitable estoppel and that the facts presented on appeal did not establish a cause of action for municipal tort liability. The City did not raise these issues in the trial court or on appeal, and specifically agreed to the trial of the case on the theory of the City having an obligation, in the nature of contract obligations, to comply with the terms and conditions of the building permits and the code and regulations under which the permits were issued. Thus, the Second District decision is in direct and express conflict with *Commodore Plaza at Century 21, etc.* v. *Cohen,* 350 So2d 502 (Fla 3rd DCA 1977); *Tamiami Trail Tours, Inc.* v. *Cotton,* 432 So2d 148 (Fla 1st DCA 1983), as the City did not object or allege any error concerning equitable estoppel, and *National Automobile Insurance Association* v. *Brumit,* 98 So2d 330 (Fla 1957); *Holmes* v. *School Board of Orange County,* 301 So2d 145 (Fla 4th DCA 1974); *Karl* v. *David Ritter,* 164 So2d 23 (Fla 3rd DCA 1964), as the City acquiesced in the factual theory of the trial of the case and the jury instructions. The Second District held Landahl did not state a cause of action for equitable estoppel, but the Landahl pleading (Apx 3) contains all of the essential elements of such an action as established in *Town of Largo* v. *Imperial*

Home Corp., 309 So2d 571 (Fla 2d DCA 1975); *Texas Co.* v. *Town of Miami Springs*, 44 So2d 808 (Fla 1950). If this issue had been raised in the trial court, Landahl could have corrected his pleadings, if such were needed, and in any event the City tried the case without any objection on this ground. See Rule 1.190(b), Fla R Civ P. The decision of the Second District is in express and direct conflict with the *Town of Largo* and *Town of Miami* cases. The Second District also held that the stopping of proper construction under valid building permits, without any reasons being given, and in violation of the City's Code and regulations was a "discretionary" function and not subject to municipal tort liability, citing *Trianon Park Condominium Association, Inc.* v. *City of Hialeah*, No. 673,115 (Fla Apr 4, 1985). This Second District decision is in direct and express conflict with the *Trianon Park* case, as that case expressly states that non-policy decision making is not a discretionary function of government, but is non-discretionary and administrative in nature, for which tort liability may attach. Also, the Second District decision is in direct and express conflict with *Rupp* v. *Bryant*, 417 So2d 658 (Fla 1982) which held that if there is an existing regulation or code provision requiring governmental acts to be performed in a particular manner, the performance of the act in accordance with the regulation or code is administrative and not discretionary, and tort liability may attach. In stopping Landahl's construction, the City breached its own Code and regulations on the procedure for stopping construction and breached the terms and conditions of the building permits. The City agreed to this theory of the case. Apx 34. Further the Second District decision is in conflict with the *Trianon Park* case and the line of cases such as *City of Miami* v. *Albro*, 120 So2d 23 (Fla 3rd DCA 1960) and *Shipp* v. *City of Miami*, 172 So2d 618, cert dismd 172 So2d 439 (Fla 1965) which hold that a municipality may be liable in tort for wrongful and negligent acts of its police officers in enforcing the law.

In the present case, it was a police officer of the City, without any authority from the building permit or zoning department of the City who ordered Landahl to stop construction.

ARGUMENT I

The decision of the Second District expressly states that the "record we have is pitifully meager and the issues raised on this appeal do not really address" the principles of law upon which the trial court judgment is reversed. The Second District incorrectly relied upon an incomplete record in conflict with *Applegate* v. *Barnett Bank of Tallahassee*, 377 So2d 1150 (Fla 1980); *JOA Corp.* v. *Lamerica Realty Co.*, 435 So2d 972 (Fla 3rd DCA 1983); *Renna* v. *North Lauderdale*, 430 So2d 945 (Fla 4th DCA 1983). The Second District reversed the trial court decision on the ground that Landahl could not recover from the City for refusing to permit Landahl to engage in construction in accordance with a valid building permit issued to it and in reliance upon which Landahl expended over $250,000 in out of pocket expenses. The Second District relied upon *Trianon Park Condominium Association, Inc.* v. *City of Hialeah*, No. 63,115 (Fla Apr 4, 1985) in holding that Landahl had no cause of action and relied upon *Town of Largo* v. *Imperial Homes Corp.*, 309 So2d 571 (Fla 2d DCA 1975) to hold that the Landahl pleading failed to state a cause of action.

In relying upon the incomplete record, the Second District incorrectly relied upon misleading facts and procedures. The Second District was not aware that the *Trianon Park* case theory was not, by agreement of the City, the theory of the cause of action in the trial court, which is why the City did not raise the issue on appeal or provide an appeal record informative on the issue. If the appeal record had been complete, it would have been clear that the *Trianon Park* case was not applicable to the facts of the case against the City. Also, neither the appeal record

nor the argument of the parties were informative on equitable estoppel, and if the record had been complete, it would have shown that the pleading did state a cause of action for equitable estoppel and that the necessary facts were proved at trial. See Fla R Civ P 1.190(b). The record would further have shown the City waived any right to object and acquiesced in the trial procedures, pleadings, and facts on these issues, and agreed to the applicable law for the facts of the case. See Apx 34.

ARGUMENT II

The decision of the Second District is in express and direct conflict with the line of cases that hold that issues not raised in the appellate court by the appellant are waived and abandoned. *National Automobile Insurance Association* v. *Brumit,* 98 So2d 330 (Fla 1957). The decision is also in conflict with the related rule that a party may not assert as trial court error actions to which he has not objected, *Commodore Plaza at century 21, etc.* v. *Cohen,* 350 So2d 502 (Fla 3rd DCA 1977); *Tamiami Trail Tours, Inc.* v. *Cotton,* 432 So2d 148 (Fla 1st DCA 1983), or in which he has acquiesced, *Holmes* v. *School Board of Orange county, 301 So2d 145 (Fla 4th DCA 1974); Karl* v. *David Ritter,* 164 So2d 23 (Fla 3rd DCA 1964). Also, objections made in the trial court which are not argued on appeal are abandoned. *Nasrallah* v. *State,* 180 So2d 477 (Fla 3rd DCA 1965). Compare the City's designation of judicial acts to be reviewed (Apx 37) with the errors argued by the City on appeal (Apx 39).

The Second District reversed on the round that Landahl had not stated a cause of action against the City for equitable estoppel and could not recover on the theory of municipal tort liability, but the City did not object, agreed and acquiesced in the cause of action theory as far as equitable estoppel was concerned and consented to the trial of the case on the theory that the City was obligated to comply with the terms and conditions of the building per-

mits and the code and regulations under which the permits were issued. See agreed jury instruction at Apx 34. In *Town of Largo* v. *Imperial Homes Corp.*, 309 So2d 571 (Fla 2d DCA 1975) it was stated that "A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deed . . ." at 309 So2d 573. The Second District decision is in direct and express conflict with this language of the *Town of Largo* case. Also, issues not raised by the pleadings in the trial court, but which are tried without objection and or by acquiescense or consent shall be treated in all respects as if they had been raised in the pleadings. Fla R Civ P 1.190(b). The record on appeal was not intended or designed for dealing with the issues raised *sua sponte* by the Second District. Landahl would respectfully submit that it did not have a fair opportunity to defend or argue against these issues raised by the Second District in surprise to Landahl. Please see Landahl's arguments at Apx 65, 82. See the appeal issues raised by the City at Apx 39.

ARGUMENT III

The decision of the Second District is in express and direct conflict with *Town of Largo* v. *Imperial Home Corp.*, 309 So2d 571 (Fla 2d DCA 175). See also *Bregar* v. *Britton*, 75 So2d 753 (Fla 19540; *Texas Co.* v. *Town of Miami Springs*, 44 So2d 808 (Fla 1950). In the *Town of Largo* case the Court held that "A citizen is entitled to rely on the assurances and commitments of a zoning authority is bound by its representations, whether they be in the form of words or deeds. . . ." 309 So2d at 573. Although the decision upheld an injunction against the municipality, the language of the decision does not restrict in any way the right to recover money damages against a municipality.

The first count of the Landahl pleading against the City was entitled "EQUITABLE ESTOPPEL" and alleges that

Landahl purchased the properties in reliance on the existing zoning and obtained building permits from the City, and thereafter, "expended in excess of $250,000 in reliance on the building permits." The pleading further alleges that the City knew that Landahl was relying on existing zoning and permits, but without proper cause and in violation of its own Code ordered Landahl to stop construction under the permits. Apx 3-10. These facts meet the cause of action guidelines of the *Town of Largo* case. Landahl proved at a trial each of the elements set forth in the case of *Town of Largo*, and related cases, and the City consented at the trial to the jury instruction on the point. Apx 34. The City consented to a jury instruction on damages, as it preferred to pay a money damage rather than permit the high rise construction of Landahl. Landahl, as late as the week before trial, offered to settle on the basis of the *Town of Largo* theory that Landahl was entitled to the benefit of the permits, but in view of the problems with the City, at the time of trial took the position that either a money judgment or the permits was acceptable, and the parties agreed to a money damage jury instruction a to the City. See Apx 34. The surprise and confusion of the Second District decision, along with the 10 day time limitation to file a motion for rehearing on entirely new issues, prevented Landahl for adequately presenting this matter to the Second District. Please see Apx 65,82. In addition, since the City did not object or raise this equitable estoppel issue in the trial court or on appeal, the Second District decision is in direct and express conflict with the rule that Landahl should have been permitted to amend its pleading to correct any defect in the allegations for a cause of action, especially after the case was 9 years old and the issue had never previously been raised. See *Roberts* v. *Keystone Trucking Company*, 259 So2d 171 (Fla 4th DCA 1972) and *Puleston* v. *Alderman*, 4 So2d 704 (Fla 1941).

ARGUMENT IV

The decision of the Second District is in express and direct conflict with *Trianon Park Condominium Association, Inc.* v.*City of Hialeah*, No. 63,115 (Fla Apr 4, 1985), and with *Rupp* v. *Bryant*, 417 So2d 658 (Fla 1982), as well as the line of cases such as *City of Miami* v. *Albro*, 120 So2d 23 (Fla 3rd DCA 1960) *Shipp* v. *City of Miami*, 172 So2d 618, cert dismd 172 So2d 439 (Fla 1965).

The Second District cited the *Trianon Park* case and stated that Landahl was not entitled to recover from the City for the refusal of the City to permit Landahl to continue construction in accordance with the terms of the building permits and for stopping construction in violation of the terms of its Code and regulations for stopping construction began under building permits it has issued. The factual situation, not in the record on appeal as the parties did not consider the appeal to be dealing with any factual matters, is that a police officer for the City visited each of the Landahl building sites and posted notices that construction was to stop. The authority for this action did not come from the City's zoning or building department. On the date this took place the Mayor of the City was out of town for the day, and the police officer acted in response to pressure from local citizen groups that did not want high rise units built in the City. Thereafter, the City administrators, though denying they participated in the stopping of construction, took no action to rescind the police officer's action, but did offer to permit Landahl the option to build out on "the point" where there was already a high rise building. In stopping the construction, the City violated its own Code provision for stopping construction. See Section 103.2, City of Cape Coral Building Code, Trial Exhibit 4. That section requires that if the City stops construction, it must state in writing the reasons therefore and the terms upon which construction may commence

again. Landahl was never told of the specific reasons for stopping construction, except citizen pressure, and no terms were ever given upon which construction commence again. The City's position continued through the trial of this action some 9 years later. See Count I of Landahl's pleading (Apx 3) where equitable estoppel relief was demanded and an injunction requested for enforcement of the permit rights (Apx 8), and then compare the jury instruction agreed to by the City (Apx 34). As to the reasons for stopping construction, see the City's pre-trial statement at Apx 11.

The *Trianon Park* case holds that a municipality is not liable in tort for the manner in which it exercises its "discretionary" powers, but is subject to tort rules of liability for acts that do not rise to the level of decision-making, but which are nondiscretionary or administrative in nature at the operational level. The City's police officer stopping Landahl's construction under properly issued valid permits was an operational level administrative act described in the *Trianon Park* case. The decision to "issue" a permit may be a "discretionary" act, but the stopping of construction under a valid permit and in violation of the City's Code and regulations is not. *Trianon Park, supra.* Also, the stopping of construction under a validly issued building permit is to be distinguished from zoning issues. Zoning is a policy decision making function at the executive hearing level, but building permits are issued, without hearing, by administrative-operation level employees following laws and regulations enacted by the City. The case of *Rupp* v. *Bryant, supra,* held that if there is an existing regulation or code provision requiring or directing the governmental act to be performed in a particular manner, the manner in which the act is performed loses all indicia of any discretionary characteristic, and the tort liability rules apply. The City violated its own Code and regulations in stopping Landahl's construction, and under the *Rupp* case the tort rules of liability apply.

Also, the stopping of construction by a police officer, who acts wrongfully or negligently, falls in the category of cases long recognized as imposing tort liability on municipalities. No logical distinction can be made between a police officer wrongfully seizing property or person and a police officer who wrongfully seizes the property right in building permits to engage in lawful construction. *City of Miami* v. *Albro, supra; Shipp* v. *City of Miami, supra; Trianon Park, supre,* on general principles, but also at p 13.

CONCLUSION

It is respectfully requested that this Court accept discretionary jurisdiction pursuant to Fla R App P 9.030(a)(2)(A)(iv).